NO. 49346-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROGER DUANE CALHOON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

# REPLY BRIEF OF APPELLANT

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## A. ARGUMENT IN REPLY

### 1. THE VIDEO SHOWING MR. CALHOON REPEATEDLY DRIVING AWAY AFTER INITIALLY STOPPING, CULMINATING IN A STATE PATROL OFFICER BREAKING HIS CAR WINDOW AND FORCIBLY EXTRACTING HIM BY USE OF A DOG, AND PHOTOGRAPHS OF MR. CALHOON'S BUMPER STICKER WERE NOT PROBATIVE OF INTENT OR STATE OF MIND, AND MORE PREJUDICIAL THAN PROBATIVE

Mr. Calhoon has raised four primary arguments in his opening brief, and rests on those arguments contained in the opening brief with the exception of this argument in reply pertaining to admission of video evidence of the traffic stop, the action of a State Patrol officer in breaking a window in his vehicle and using a dog to extract Mr. Calhoon from his car, and photos of a bumper sticker on Mr. Calhoon's car displaying what may be perceived as an anti-government or anti-authority sentiment.

After Trooper Ball initiated the traffic stop of Mr. Calhoon's vehicle, Mr. Calhoon pulled over to the left shoulder of Interstate 5, and was then directed by the Trooper's public-address system to move to the right shoulder of the interstate. 1RP at 149. Mr. Calhoon merged into traffic and started to move the right and "briefly" came to a complete stop on the right shoulder. 1RP at 150. Using his public-address system again, Trooper Ball instructed Mr. Calhoon to put the car in park and turn off the

ignition, at which point Mr. Calhoon reentered traffic and then stopped again on the right shoulder. 1RP at 155. Trooper Rosser stopped his vehicle behind Mr. Calhoon's car and approached on the right side. 1RP at 155-56. Mr. Calhoon handed the Trooper a card and then resumed driving, pulled over to the right shoulder again and stopped then accelerated into traffic again and then stopped for a final time on the right shoulder. 1RP at 160.

Trooper Ball approached with car with his weapon drawn and Trooper Bendiksen blocked Mr. Calhoon's car and. Mr. Calhoon lowered the driver's window; meanwhile Trooper Bendiksen used a baton to break the passenger side window and unlocked the door, at which point Troopers sent into the car through the passenger door, and Mr. Calhoon was pulled from the car, taken to the ground and handcuffed. 1RP at 164. This violent end to the episode was recorded and which, was entered as Exhibit 1 and published to the jury while Trooper Ball provided a narrative of the events. 1RP at 148, 166-182. The video was stopped after Mr. Calhoon was pulled out of the car and handcuffed. 1RP at 182, 2RP at 262.

The State also introduced photographs, including Exhibit 7 which showed a bumper sticker on the back of Mr. Calhoon's car which read:

Stop. Private property

Please take note: I do not consent to federal police enforcers, legal jargon, unlawful search and seizures, touching me or my property in any way

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1RP at 192.

Defense counsel unsuccessfully moved to suppress this evidence including the photo of the bumper sticker, and the video culminating in the violent extraction from the car. 1 RP at 42.

In its response, the State argues that this evidence—which the State also elected to characterize as evidence of flight at trial—was properly admitted as *res gestae* of the offense. Brief of Respondent at 18-20.

The trial court abused its discretion by admitting the challenged video and photos into evidence. *Res gestae* is the "same transaction" exception to ER 404(b) in which evidence of other bad acts is admissible "'[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" ***State v. Powell***, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (internal quotation marks omitted) (quoting ***State v. Tharp***, 27 Wn.App. 198, 204, 616 P.2d 693 (1980)); see also ***State v. Thompson***, 47 Wn.App. 1, 11–12, 733 P.2d 584, review

denied, 108 Wn.2d 1014 (1987). Each act must be "a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury". ***Tharp***, 96 Wn.2d at 594. "The *res gestae* exception requires that evidence 'be relevant to a material issue and its probative value must outweigh its prejudicial effect.' "***State v. Acosta***, 123 Wn.App. 424, 442, 98 P.3d 503 (2004) (internal quotation marks omitted) (quoting ***State v. Brown***, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

Evidence that tends to prove a defendant's state of mind may be admissible if it satisfies the other rules of evidence. In addition to being relevant and necessary to purposes other than proving character or propensity, a trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. ***State v. Rice***, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). "'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' "***State v. Smith***, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (quoting ***State v. Bennett***, 36 Wn.App. 176, 180, 672 P.2d 772 (1983)).

Here, the State charged Mr. Calhoon with attempting to elude. The

facts "of consequence" in the case are only the elements of the charge itself. ER 401. The video of the Trooper with weapon drawn, breaking a car window and using a dog to force Mr. Calhoon out of his car, as well as the business card and bumper sticker, were irrelevant and unfairly prejudicial to Mr. Calhoon.

The video showing the repeated stops and in particular the forcible extraction, use of a dog, use of a baton to break the window, and Trooper Ball's drawn weapon were not relevant and necessary to establish the elements of attempted eluding. Similarly, the bumper sticker was utterly irrelevant to the elements of attempted eluding.

Moreover, the business card, bumper sticker, and video of the violent arrest served only the purpose of inflaming the jury by implying, whether correctly or not, that Mr. Calhoon has political views or antiauthoritarian views that jurors may find unsavory or repugnant.

The challenged evidence admitted was not probative for motive and *res gestae* purposes. The video of the first, second, and even third stops speak for themselves and allowed the State ample room to argue to the jury that the elements of attempted eluding were established. Instead, the State felt that the extraneous, almost prurient video of the forcible extraction showed his intent to willfully stop his vehicle. Brief of Respondent at 18. The State argues, without much elaboration, that the

challenged evidence was "probative of his intent. The record supports that evaluation. There was no abuse of discretion." Respondent's Brief at 20. The State's brief, however, does not address the extremely prejudicial nature of the evidence, and the fact that the arrest itself, the card, and bumper sticker have nothing to do with the elements of the charged offense and are not necessary to present "the entire picture" of the offense.

The trial court abused its discretion by admitting the challenged evidence. The potential relevance, if there is any, is far outweighed by the potential prejudicial effect. In determining whether or not there is prejudice, the linchpin word is "'unfair.'" ***State v. Bernson***, 40 Wn.App. 729, 736, 700 P.2d 758, review den'd, 104 Wn.2d 1016 (1985). "Unfair prejudice" is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors. ***State v. Rice***, 48 Wn.App. 7, 13, 737 P.2d 726 (1987) (quoting ***State v. Bernson***, 40 Wn.App. 729, 736, 700 P.2d 758 (1985)).

In this case, the prejudicial effect is manifest; the evidence, particularly the video, was likely to have inflamed the jury and elicited an emotional response against Mr. Calhoon. Again, Mr. Calhoon was charged with attempt to elude of a pursuing police vehicle. Once the pursuit ended, any action after that is of questionable relevancy. Second, this evidence is likely to have confused the issues by focusing the jury's

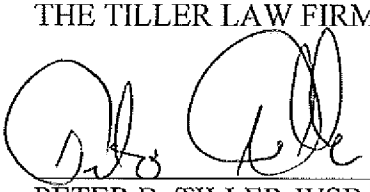
attention on the armed extraction and away from the pursuit, which is the sole element issue to be weighed in the case. Last, as argued above, the probative value of this evidence is minimal.

## B. CONCLUSION

For the reasons stated herein, and in appellant's opening brief, Mr. Calhoon respectfully requests this Court to reverse the conviction.

DATED: May 19, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on May 19, 2017, that this Appellant's Reply Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402 and to Ms. Carol La Verne, Deputy Prosecuting Attorney and a copy was mailed by U.S. mail, postage prepaid, to the appellant Mr. Roger Duane Calhoon:

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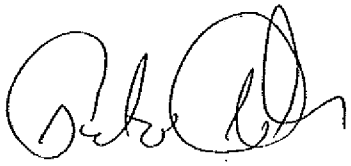
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 19, 2017.



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